THE EXERCISE OF PROSECUTORIAL DISCRETION: CHALLENGES TO ENVIRONMENTAL PROSECUTIONS

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A Symposium on
Environment in the Courtroom (II): Environmental Prosecutions

March 18-19, 2013 (Updated November 22, 2017)
University of Ottawa

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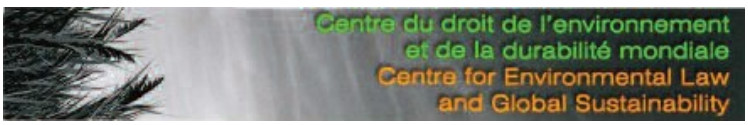

INTRODUCTION

The position of a Crown counsel is unique in that the goal of the Crown is not predicated on seeking a conviction. Instead, the goal of the Crown is to assist the trier of fact in ensuring that all of the credible evidence is put before the court. The focus of this paper is to examine some of the factors that shape and guide a Crown counsel in exercising their discretion to prosecute environmental cases. Environmental cases carry some inherent challenges that may affect the discretion of a Crown counsel to approve charges and prosecute a case. Such challenges will influence and shape a Crown's discretion in all areas of decision making such as: determining plea resolution, whether to proceed to trial or discontinue a prosecution, private prosecutions and entering a stay of proceedings.

CROWN DISCRETION — BRIEF HISTORY

The Crown counsel has a duty to ensure the proper administration of justice and in doing so must take into account the fairness of the accused, victims of crime, and the public interest. The public confidence in the administration of justice is strengthened where the system encourages Crown counsel to be strong and effective advocates.[1] The role of a Crown counsel has been described as a symbol of fairness within a complex system of law and order. The Supreme Court of Canada in *R. v. Boucher*[2] provided the following comments concerning the role of a Crown counsel:

> "It cannot be overemphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness, and the justness of judicial proceedings."[3] (Emphasis added)

The Attorney General has the responsibility to carry out prosecutions independent of pressure from interest groups and free from political influence. This unique and powerful position is fundamental to enable the balance of power within the criminal-regulatory justice system. Prosecutorial discretion has been described as the discretion exercised by the Attorney General in matters within his authority in relation to the prosecution of criminal offences.[4] The Attorney General is the chief law officer of the Crown and a member of the Cabinet within the government. This unique relationship was discussed in

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[1] *R v Cook* (1997), 114 CCC (3d) 481 (SCC) at 489.

[2] [1955] SCR 16 (Rand J).

[3] *Ibid* at 7.

[4] *Krieger v Law Society of Alberta*, 2002 SCC 65 (CanLII).

Kreiger[5] by the Supreme Court of Canada whereby the court referred to prosecutorial discretion as follows:

> Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum.[6]

DECISION TO PROSECUTE

The Crown counsel must consider two factors in determining whether to prosecute a case. The first question to ask is—*whether the evidence is sufficient to justify the institution or continuation of a proceeding?*; and secondly, *does the public interest require a prosecution to be pursued?*[7] The courts will afford a Crown counsel with a high degree of deference, but the scope of the deference is not unlimited. In determining whether there is enough evidence to support a proceeding, the courts have determined a test which encompasses both subjective and objective elements. As discussed by the Supreme Court of Canada in *Proulx v. Quebec (Attorney General)*,[8] the court determined that there must be an actual belief on the part of the prosecutor and that belief must be reasonable in the circumstances—that there is enough evidence to support a prosecution. As this determination is one of law, not fact, the judge is tasked with the responsibility to make that determination.

With that said, in Canadian legal jurisprudence, the scope of prosecutorial discretion and what constitutes Crown misconduct—continues to receive considerable judicial attention in the context of malicious prosecutorial actions against Crown counsels. In these cases,[9] the courts continue to afford a high level of deference to the decisions made by the prosecution.

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[5] *Ibid* at para 23-32.

[6] *Ibid* at para 47.

[7] Public Prosecution Service of Canada, *The Federal Prosecution Service Desk book*, Chapter 15, online: http://www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/toc.htm.

[8] [2001] 3 SCR 9.

[9] *Nelles v Ontario* (1989), 60 DLR (4th) 609 (SCC); *Proulx v Quebec (Attorney General)* (2001) SCC 66 (CanLII). (There are four necessary elements which must be proved for success in an action for malicious prosecution: A. the proceedings must have been initiated by the defendant; B. the proceedings must have terminated in favour of the plaintiff; C. the plaintiff must show that the proceedings were instituted without reasonable cause, and D. the defendant was actuated by malice.) *Nelles* at 615.

The Sufficiency of Evidence

There are a number of factors a Crown may consider in determining the sufficiency of the evidence. The list of factors is not exhaustive and will be based on the circumstance of the case. Environmental prosecutions present a unique set of challenges to a Crown counsel in determining the sufficiency of the evidence. These unique class of prosecutions are considered to be regulatory prosecutions rather than true criminal law offences. This is an important distinction because it places environmental offences within the category of strict liability offences. This was discussed in great detail by the Supreme Court of Canada in *R. v. Sault Ste. Marie*[10] which held that strict liability offences did not require a *mens rea* but rather the *actus rea* to prove the elements of the offence. In addition, it was reasoned that the defence of due diligence was available to the defendant.

Credible Witnesses and the Expert

As part of a Crown counsel's exercise of reviewing the evidence, the Crown must assess the credibility of potential witnesses. In doing so, one must take into account such matters as the availability, competence and the credibility of various witnesses. This becomes a more difficult exercise when applied to an expert witness. The expert witness plays a crucial role in proving the elements of a case in most environmental prosecutions.[11] Unlike other witnesses, the expert witness is viewed as having *special knowledge* in their respective discipline that can provide assistance to the trier of fact. Once qualified as an expert under a *voir dire*, the expert can provide opinion evidence which a court may rely on in its judgment.

The high degree of deference that a court may grant an expert witness will have an impact on the discretion exercised by Crown counsel. The challenge to the Crown is not limited to the assessment of the credibility of the expert witness—but in addition—the Crown should present the special knowledge of the expert in an attempt to aid and assist the trier fact. This raises questions such as: who is the right expert?; what is the experience of the expert?; is the data quantifiable?; how many experts are available?; is the debate of the methodology?—all of which must be given great scrutiny by the Crown in relation to the overall reasonable expectation of conviction.

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[10] [1978] 2 SCR 1978 (SCC).

[11] *Fisheries Act*, RSC 1985, c [F-14], ss 35-36(3). Both sections of the *Fisheries Act* require expert opinion evidence to prove certain elements of the offence. The exception to this general rule is offences under s 36(3) where the deleterious substance in question that was deposited, and its quantity or concentration, is authorized by regulations. In such instances the requirement of leading expert evidence is lifted. This was the subject of debate in *Williams Operating*, *infra* note 23; the court deemed it unnecessary for an expert if by way of regulation substances are deemed to be deleterious.

Admissibility of Evidence (Section 8 of the Charter)

It can be argued that the admissibility of evidence is one of the most important factors affecting the discretion of a Crown counsel. This includes all aspects of the Crown's case and in particular, the evidence gathered as a result of an inspection and search. In most environmental legislation there are distinct powers that enable designated authorities to conduct inspections to ensure compliance with legislation or regulations. In this context, a Crown counsel must dedicate extra scrutiny to the use of the inspection power for the purpose of ensuring compliance with the legislation.

A number of cases have caused Crown counsel to revisit the case law associated with section 8 of the *Canadian Charter of Rights and Freedoms*.[12] In the regulatory world, the courts have acknowledged that inspection powers are necessary in order to ensure compliance with the legislation in question. The facts of a particular case will determine what test a court will apply in a given factual circumstance. In *R. v. Jarvis,*[13], the question for the court was to determine at what point a government appointed investigator crosses the threshold often referred to as the "*Rubicon*"—that will afford *Charter* protection. In *Jarvis,*[14] the Supreme Court of Canada in deciding the breadth of an inspection power reasoned that an inspection will violate section 8 of the *Charter* if the predominant purpose of the site visit is to gather evidence for the purpose of a prosecution. This was articulated by Iacobucci and Major for the court:

> In our view, where the predominant purpose of a particular inquiry is the determination of penal liability, CCRA officials must relinquish the authority to use the inspection and requirement powers under ss. 231.1(1) and 231.2(1). In essence, officials "cross the Rubicon" when the inquiry in question engages the adversarial relationship between the taxpayer and the state. There is no clear formula that can answer whether or not this is the case. Rather, to determine whether the predominant purpose of the inquiry in question is the determination of penal liability, one must look to all factors that bear upon the nature of that inquiry.[15] (Emphasis added)

In *R. v. Nolet*[16] the Supreme Court of Canada considered inspection powers in the context of a routine highway stop under the authority of provincial legislation. In that case, the Supreme Court distinguished *Jarvis* and created a new test to determine when the Rubicon has been crossed and s. 8 will be triggered. Although the court recognized the "*Jarvis* test" as the appropriate test for the particular facts of that case, it did—however—distinguish those facts from *Nolet*. Binnie J. for the majority of the court reasoned that in cases where the intent of the search is penal, the question for the court to determine is

[12] *The Constitution Act, 1982,* Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[13] [2002] 3 SCR 757 (S.C.C).
[14] Supra note 13.
[15] *Ibid* at para 88.
[16] [2010] 1 SCR 851 (S.C.C).

whether the search was reasonable in the *totality of the circumstances*.[17] The distinguishing factor between the two cases suggests that a Crown must identify whether the facts and the legislation support a situation where there is a "crossing the Rubicon" from a civil dispute into an adversarial relationship with penal liability (*Jarvis*). Whereas, in *Nolet*, the courts determined the inspection had a penal consequence and there was no option to solve the matter through civil means. In essence, there was no Rubicon to cross in the case of *Nolet*. Binnie J. provided a summary at paragraph 86:

> The present case is wholly different. We are not "crossing the Rubicon" from a civil dispute into penal remedies. Here the context was always penal. The *Charter* applies to provincial offences as well as to criminal offences. The shifting focus argument was appropriate in *Jarvis*, but I do not think it helps in the solution of this appeal. The issue here is whether the police search of the duffle bag did "in the totality of the circumstances" invade the reasonable privacy interest of the appellants. I would hold that it did not.[18]

The *Nolet* decision was followed in *R. v. Mission Western*[19] which dealt with an inspection of a construction site under the authority of the *Fisheries Act*.[20] In *Mission*, the British Columbia Court of Appeal held that a court must review the actions of the officers and determine if their actions were reasonable. Bennett J. held at paragraph 40:

> Like the inspection in *Nolet*, the DFO employees' actions always took place, broadly speaking, in a "penal" or "adversarial" context, in the sense that s. 49(1) of the *Fisheries Act* grants powers of entrance and inspection "for the purpose of ensuring compliance with this Act and the regulations". Ultimately, the proper question for consideration, as Binnie J. held in *Nolet*, is whether the officers' regulatory inspection powers were exercised reasonably in the totality of the circumstances.

The case law surrounding section 8 of the *Charter* and the use of inspection powers by environmental agents will continue to challenge Crown counsel. In that respect, the test developed in *Jarvis* is still considered valid law in Canada. The challenge of a Crown counsel is to understand which test should be used based on the facts and the legislation in question. In addition, the Crown must assess the facts and determine if any of the evidence was collected while in the officers were "investigating" contrary to the s. 8. These factors will have a critical impact on the discretion exercised by the Crown as it pertains to the approval of charges. The existence of a *Charter* violation may lead to an exclusion of evidence that may be essential to sustain a conviction—all of which weighs on the Crown counsel to make a sound decision based on an accurate interpretation of the law.

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[17] *Supra* note 16 at para 86.

[18] *Supra* note 16 at para 86.

[19] 2012 BCCA 167 (CanLII). *(Important to note, this case was a decision on leave to appeal to the BCCA. The BCCA denied the appeal.)

[20] *Supra* note 11.

Possible Defences

A zealous consideration of defence should be part of a Crown's routine assessment of a case. Although in theory, a Crown counsel must consider all the evidence available at the time it is presented by an investigator, however, this may not be possible in certain environmental cases. One example is the submission of a defence counsel's expert report. The Crown is not entitled to the expert report of an accused until the close of the Crown's case.[21] In such cases, a Crown counsel must consider a number of defences that are open to an accused. All of which are not required to be disclosed to the Crown before trial. There is a range of defences available that will impact a Crown counsel's discretion:

Due Diligence

- In *R. v. Gemtec Ltd. and Robert Lutes*, the New Brunswick Court of Appeal convicted an engineering consulting company of violating federal environmental laws based a failure to incorporate environmental compliance into their advice. As a result, Crown counsel must anticipate due diligence defences of all parties involved landowners, operators, subcontractors, and consultants;[22]

- In *R. v. Syncrude Canada Ltd*, the Alberta Provincial Court described the test in due diligence as: "To meet the onus, Syncrude is not required to show that it took all possible or imaginable steps to avoid liability. It was not required to achieve a standard of perfection or show superhuman efforts. It is the existence of a "proper system" and "reasonable steps to ensure the effective operation of the system" that must be proved. The conduct of the accused is assessed against that of a reasonable person in similar circumstances;[23]

- Despite the fact that an employee of the defendant poured several thousand litres of a liquid substance into a storm drain on the defendant property in contravention of provincial legislation—the Ontario Court of Justice, *Ministry of the Environment v. Control Chem Canada Ltd*—dismissed all charges and reasoned that the "scope of the Defendant's efforts to avoid and remediate any out of doors spills or discharge was broad, thorough, detailed,

[21] Criminal Code s. 657.3(**c)** in addition to complying with paragraph (a), an accused, or his or her counsel, who intends to call a person as an expert witness shall, not later than the close of the case for the prosecution, provide to the other party or parties the material referred to in paragraph (b).
[22] *R v Gemtec Ltd* (2007), 321 NBR (2d) 200 (NBCA).
[23] *R. v. Syncrude Canada Ltd*., 2010 ABPC 229

well documented, understood by employees and subject to frequent internal and external compliance review."[24]

Act of God

- In *R. v. British Colombia Hydro and Power Authority*,[25] Lamperson J. stated that a one in one thousand year event can be treated as an act of God. However, he held that a one in one hundred year events are "routinely planned for" and cannot be treated as such. The Ontario Provincial Court in *R. v. Weyerhaeuser* took a different position and considered a one in one hundred year rainfall is to be treated as an Act of God—despite evidence of a lack of maintenance and care of the collapsed road crossing.[26] Such inconsistencies provide little to no guidance to Crown counsel in circumstances where a large unexpected event is alleged to have contributed to the offence.

Science v. Law (adequate science)

- *R v. Weyerhaeuser*, the Ontario Court of Justice reasoned that the science discrepancy between experts from the defence and the Crown was not enough to enter a conviction.[27] Crown counsel must consider the complexity and adequacy of the expert evidence. In doing so, a Crown must determine if an expert's evidence will offer a convincing opinion that a court will understand and relate to the elements of the offence in question.

Officially Induced Error

- The Supreme Court of Canada considered the defence of officially induced error in *La Souveraine, Compagnie d'assurance générale v. Autorité des marchés financiers.*[28] In doing so, Abella J. endorsed the six criteria for this defence as elaborated by Lamer C.J. in *R. v. Jorgensen.*[29]

1. that an error of law or of mixed law and fact was made;
2. that the person who committed the act considered the legal consequences of his or her actions;
3. that the advice obtained came from an appropriate official;

[24] *Ministry of the Environment v. Control Chem Canada Ltd* (March 15, 2016), ON Prov Ct No. Burlington 139537 – 01.
[25] [1997] B.C.J. No. 1744
[26] *R v. Williams Operating* (2008), CanLII 48148 (ON SC) [*Williams Operating*].
[27] *R v. Weyerhaeuser* (2007), ON COJ [Unreported].
[28] [2013] S.C.J. No. 63 (S.C.C).
[29] [1995] 4 S.C.R. 55 (S.C.C)

4. that the advice was reasonable;
5. that the advice was erroneous; and
6. that the person relied on the advice in committing the act. [para. 26]

Public Interest

If there is enough evidence to support the institution or continuation of a prosecution, Crown counsel must consider whether, in light of the evidence, the public interest requires a prosecution. The meaning of the public interest was considered by Sir Hartley Shawcross, Q.C. (Former Attorney General of England in the U.K. debates):

> It has never been the rule in this country — I hope it never will be that suspected criminal offences must be subject to prosecution. Indeed, the very first regulations under which the Director of Public Prosecutions worked provided that he should....prosecute, amongst other cases: "wherever it appears that the offence or the circumstances of its commission is or are of such a character that a prosecution in respect thereof is required in the public interest." That is still the dominant consideration.[30]

In the exercise of the discretion by the Crown counsel a number of different factors may guide a Crown in deciding whether to institute proceedings. In theory, the more serious the offence, the more likely the public interest will weigh on that discretion. With that said, it does not suggest that lesser offences should employ a lesser threshold. Consultation with the investigative agency can help a Crown in such cases but ultimately such decisions reside with the prosecution.

Seriousness or Triviality of the Alleged Offence (de minimus non curat lex)

In most circumstances, Crown counsel is required to consider the public interest, even in cases where an alleged offence is not serious. With that said, Crown counsel may be presented with an occurrence that may appear to be a trivial violation of the Act. The difficulty with the concept of *de minimus* is that case law has suggested—that *de minimus* does not apply to public welfare offences or strict liability. Platana J. in *R. v. Williams Operating*[31] stated as follows:

> The trial judge used the maxim of *de minimus non curat lex* to determine that the quantities of the substances deposited were so insignificant as not to constitute an offence. I accept the Appellant's argument that based on the principles in *R. v. Sault Ste. Marie*, *R. v. Goodman* and *R. v. Croft*, *de minimus* does not apply to public welfare offences or strict liability offences.[32]

[30] UK, HC Debates, vol 483, col 681 (29 January 1951).
[31] (2008), CanLII 48148 (ON SC).
[32] *Ibid* at para 86.

In essence, it could be argued that one drop oil in a large water body with fish could potentially trigger regulatory prosecution.[33] The question to consider is whether the public interest is satisfied in such cases. This determination becomes a difficult exercise in the balance between the public interest and application of *de minimus* to environmental prosecutions.[34] This can only be answered on a case by case basis with a delicate consideration of the facts.

Significant Mitigating or Aggravating Circumstances

The behaviour of an accused will likely impact the way a Crown counsel will exercise their discretion during a prosecution.[35] For example, if an accused remediates a site soon after the commission of the offence, this may be seen as a mitigating factor in determining whether to pursue charges or in a sentencing hearing. In contrast, an accused that knowingly breaches environmental laws—and does so as a cost of doing business—would likely be viewed as aggravating.

This issue was discussed in *R. v. Ivy Fisheries*[36] where a court ordered a fine in the amount of $650, 909 for fishing tuna contrary to a *Fisheries Act* licence conditions. Of that fine, $625, 909 was ordered to be paid under section 79 of the *Fisheries Act* which deals with an additional fine. The court reasoned the additional fine was required to offset proceeds from the sale that was made as result of the licence breach.

Sentencing Considerations

One of the goals of an environmental prosecution is not necessarily to seek punishment of the accused. For example, in some cases, Crown counsel should be guided by the principle of seeking a remediation plan—that would put the environment in a position—as if the offence had not been committed. In addition, Crown counsel must understand what type of sentence is appropriate and proportional to the offence committed. In other words, does the offence match the fine? Some environmental legislation may have abundant case law that will aid a Crown in such circumstances but this may not always be the case. The latter consideration will place the Crown in a position of trying to decide if the case is worth prosecuting based the prospect of a low fine amount. For example, in cases where a Crown counsel is tasked with deciding whether to prosecute a particular

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[33] The release of oil could be considered a deleterious substance which is prohibited under s 36(3) of the *Fisheries Act.*

[34] Various cases have ruled that *de minimus* does not apply to strict liability offences—*Williams Operating, supra* note 23; *R v Croft* (2003), NSCA 109 (CanLII), (2003), 218 NSR (2d) 184 (NSCA); *R v Goodman*, [2005] BCJ No 542 (BC Prov Ct – Crim Div).

[35] Other factors to consider: the accused's alleged degree of responsibility for the offence, previous convictions, other records of noncompliance.

[36] (2006), 245 NSR (2d) 381 (Prov Ct).

case—where the allegation against the accused is one drop of oil in a large body of water—what factors should a Crown consider in the assessment of the public interest?

Such decisions can be said to be based on the public interest. However, it is understood in these cases that Crown counsel may be motivated to make a decision that will undoubtedly be influenced by the prospect of a low fine amount. I don't suggest that fine amounts are the only factor to consider in such cases. However, it certainly is a factor that a Crown counsel will be unable to overlook depending on the circumstances. Some other factors a Crown counsel may take into account are as follows:

- Do the facts support a low fine that is not worth pursuing?;
- Will the court order technical details for a restorative action? (e.g. under *Fisheries Act*, s 79.2);
- What are the estimated costs of the prosecution? Will the cost of the prosecution surpass the fine and remediation estimates?;
- Remediation – will the court order remediation in addition to a separate fine?;[37]
- Will the case provide a bad precedent (bad facts can create bad law)?

Alternatives to Prosecution

In some cases, Crown counsel may consider it in the public interest to pursue a prosecution; however, this may not be the most appropriate course of action in every circumstance. If that is the case, Crown counsel may consider alternatives to prosecution. The availability of alternatives to prosecution will depend on facts of each case and the legislation in question.

This may range in circumstances that may include the use of corrective measures[38] under the *Fisheries Act* to stop the likelihood of an actual deposit of a deleterious substance from entering waters frequented by fish; or an occurrence that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery, that is not authorized under this Act, or of a serious and imminent danger of such an occurrence. The above-noted authority can only be issued by a designated Fishery Officer or an Inspector under the *Fisheries Act*. In such cases, a

[37] Fisheries Act supports separate fine amounts under sections 40, 79 and 78 and restoration under section 79.2.

[38] *Fisheries Act*, s 38(7.1).

Crown counsel could decide that such an order may suffice and a prosecution under the general prohibition[39] would be unwarranted.

In addition, subsection 717(1) of the *Criminal Code*[40] and subsection 86.2(1) of the *Fisheries Act*[41] provides in certain circumstances the option to consider the use of the alternative measure. The measures may be considered by Crown counsel if certain conditions are satisfied and charges have been laid. For example, section 296 of the *Canadian Environmental Protection Act*[42] provides the option for alternative measures to a Crown counsel only if the alternative measure is not inconsistent with the purposes of the Act and the conditions set out under the section have been satisfied.

CONCLUSION

This paper has attempted to examine the role of a Crown counsel and the exercise of their discretion. In particular, the paper focuses on the challenges to environmental prosecutions. It is clear that Crown counsel faces many challenges in deciding how to exercise their unique form of discretion. It can be argued that environmental cases carry some inherent challenges that may affect the discretion to prosecute or continuance of a case. Although such challenges may exist, there is a body of case law that can aid the Crown in determining the proper exercise of their discretion.

[39] *Fisheries Act*, s 36(3), general prohibition against the release of a deleterious substance.
[40] *Criminal Code*, RSC 1985, c C-46.
[41] Bill C-68, An Act to amend the Fisheries Act and other Acts in consequence, First Session, Forty-second Parliament, 64-65-66-67 Elizabeth II, 2015-2016-2017-2018.
[42] *Canadian Environmental Protection Act, 1999*, SC 1999, c 33.